

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF WEST VIRGINIA  
MARTINSBURG**

**JOSHUA JAY BERKEY,**

**Petitioner,**

**v.**

**Civil Action No.: 3:11-CV-21**

**UNITED STATES OF AMERICA,**

**Respondent.**

**REPORT AND RECOMMENDATION TO THE DISTRICT JUDGE RECOMMENDING  
THAT THE DISTRICT COURT DISMISS THIS CASE WITH PREJUDICE AND  
STRIKE IT FROM THE DOCKET OF THE COURT**

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On March 15, 2011, the pro se Plaintiff filed a Petition in this Court requesting the return of certain property consisting of various legal documents and medical records. (Petition, ECF No. 1) Also on March 15, 2011, the Clerk of Court filed a Notice of Deficient Pleading, informing the Petitioner that he must file with the Court the following items:

- An application in forma pauperis to proceed without prepayment of the full or partial filing fees or a fee of \$350.00;
- Consent to Collection of Fees from Trust Account; and
- Prisoner Trust Account Report.

(Notice of Deficient Pleading, ECF No. 3) The Notice informed the Petitioner that he had 30 days from that date to correct the deficiencies or the Court would dismiss his case for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Id. Proof of service of that notice was returned and filed with the Court on March 21, 2011. (Return Receipt, ECF No. 5)

On April 28, 2011, this Court entered an Order to Show Cause, informing the Petitioner that, as of that date, he had not filed any of the requested items or any other form of correspondence indicating that he intended to move forward with his case. (Order to Show Cause, ECF No. 6) This Court ordered the Petitioner to show cause within 14 days of the service of that order why his case should not be dismissed for failure to prosecute. Id. Proof of service was returned and filed with the Court on May 5, 2011. (Return Receipt, ECF No. 7)

This Court has the authority to dismiss an action with prejudice for the Plaintiff's failure to prosecute under Federal Rule of Civil Procedure 41(b). See FED. R. CIV. P. 41. This Court may exercise its authority to dismiss for failure to prosecute sua sponte, and may even do so without giving notice or an adversarial hearing, provided that due process standards are met. See Link v. Wabash Railroad, 370 U.S. 626, 630-31 (1962).

As of this date, the Petitioner has been given over sixty (60) days since the service of the original notice of deficient pleading to file the forms and fees requested by the Clerk. Additionally, this Court's order to show cause put the Petitioner on notice that his case may be dismissed if he fails to file some form of document indicating that he intends to prosecute his case. This Court has given the Petitioner every opportunity to avoid dismissal of this matter, yet no action has been taken by the Petitioner to prosecute his case.

For the reasons herein stated, the undersigned Magistrate Judge **RECOMMENDS** that this case be **DISMISSED WITH PREJUDICE** and **STRICKEN FROM THE DOCKET** for the failure to prosecute pursuant to FED. R. CIV. P. 41(b).

Any party may, within **FOURTEEN (14) DAYS** after being served with a copy of this

Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable John P. Bailey, United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4<sup>th</sup> Cir. 1985); United States v Schronce, 727 F.2d 91 (4<sup>th</sup> Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

**DATED:** May 23, 2011

  
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**DAVID J. JOEL**  
**UNITED STATES MAGISTRATE JUDGE**